

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Harrington, IL, Employer**

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**Docket No. 17-1085  
Issued: December 1, 2017**

*Appearances:*

*Stephanie N. Leet, Esq., for the appellant<sup>1</sup>*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 24, 2016 appellant, through counsel, filed a timely appeal from an October 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP properly terminated compensation for wage-loss and medical benefits effective December 13, 2015; and (2) whether appellant met his burden of proof

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

to establish residuals or continuing disability causally related to the accepted injury after the termination of his compensation benefits.

### **FACTUAL HISTORY**

On November 13, 2012 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim (Form CA-1) asserting that he injured his left shoulder and lower back while carrying a mailbag on November 10, 2012. He stopped work on the date of injury. OWCP accepted that appellant sustained a left shoulder sprain and lumbar sprain and later expanded the claim to include herniated disc at L5-S1. It paid wage-loss compensation.

Appellant came under the treatment of Dr. Mark N. Levin, a Board-certified orthopedist, from January 17 to April 15, 2013, for left shoulder and low back pain. He reported working as a letter carrier and that on November 10, 2012 he injured his left shoulder when lifting a mailbag. Dr. Levin initially placed appellant on light duty, but later took him off work on February 19, 2013. He prescribed physical therapy and referend him for a functional capacity evaluation (FCE).<sup>3</sup> A February 19, 2013 magnetic resonance imaging (MRI) scan of the left shoulder ordered by Dr. Levin revealed mild rotator cuff tendinopathy, no full thickness tear, and mild marrow edema in the humeral head.

Appellant began treatment with Dr. Mohammad Ahsan, a Board-certified anesthesiologist, on February 19, 2013, for left shoulder and lower back pain which began on November 10, 2012 while carrying 50 pounds of mail at work. He underwent physical therapy with no improvement. Dr. Ahsan recommended a left shoulder intra-articular joint injection. A February 22, 2013 MRI scan of the lumbar spine, ordered by him, revealed mild spondylosis and disc protrusion at L5-S1. In reports dated April 10 and May 14, 2013, Dr. Ahsan noted that appellant presented with low back pain bilaterally. He opined that appellant's low back pain was due to a disc protrusion at L5-S1 and mild spinal stenosis at L5-S1. Dr. Ahsan performed bilateral transforaminal epidural steroid injections on April 10 and May 14, 2013.

On May 20, 2013 Dr. Levin noted that appellant had full range of motion of his left shoulder, intact strength, normal lumbar motion, and intact lumbar strength with diffuse pain over the right lumbar paraspinal muscles. He opined that appellant had obtained maximum medical improvement and was capable of full work from an orthopedic standpoint. Dr. Levin referred appellant to Dr. Ahsan for restrictions based on pain management treatment.

On June 13, 2013 OWCP proposed to terminate all benefits finding that Dr. Levin's May 20, 2013 report established no continuing residuals of his work-related conditions.

Appellant submitted a June 25, 2013 report from Dr. Ahsan who noted that appellant had reported minimal improvement from the lumbar paraspinal injections. He complained of persistent pain with difficulty sitting or standing for prolonged periods of time. Dr. Ahsan diagnosed low back pain due to herniated nucleus pulposus at L5-S1 and mild stenosis at L5-S1

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<sup>3</sup> A February 28, 2013 FCE revealed that appellant was able to perform at the medium to heavy level of physical demand. It was noted that he was able to meet all requirements of the target job of mail carrier, but had pain with lifting, pushing/pulling, and carrying.

based on appellant's physical examination, and a review of the MRI scan of the lumbar spine. He recommended a transforaminal lumbar epidural injection at L5-S1 and L4-5. Dr. Ahsan returned appellant to light-duty work on July 1, 2013.

On July 16, 2013 OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 16, 2013.

On December 2, 2013 appellant filed a claim for recurrence of disability (Form CA-2a) on November 20, 2013 causally related to his accepted work injury. He noted that at the time of the recurrence he was on restricted duty.

On December 4, 2013 appellant requested reconsideration. He submitted reports from Dr. Ahsan dated July 17 to December 19, 2013 who treated him with lumbar facet injections and lumbar radiofrequency ablation. Dr. Ahsan diagnosed joint pain of the left shoulder, osteoarthritis of the shoulder, myofascial pain/fibromyalgia, lumbar lumbago, lumbar spondylosis, lumbar herniated disc, and lumbar spinal stenosis. He noted that appellant reported 50 percent improvement with the right-sided lumbar radiofrequency ablation, but complained of increased left shoulder pain and limited range of motion. Dr. Ahsan recommended a repeat intra-articular cortisone injection. He indicated that appellant was not currently working.

By decision dated February 21, 2014, OWCP vacated the July 16, 2013 termination decision. It found that the evidence of record was insufficient to support that appellant was capable of working full duty with no restrictions due to the accepted conditions.

On March 27, 2014 OWCP referred appellant to Dr. Theodore J. Suchy, a Board-certified orthopedist and second opinion physician, to determine if the accepted conditions had resolved. In an April 28, 2014 report, Dr. Suchy provided results on examination and indicated that he had reviewed the records provided. A lumbar spine examination revealed normal range of motion and negative straight leg raising test. Muscle strength was intact and symmetrical, reflexes were equal and symmetrical, there was no pain with hyperextension of the back, and no objective findings regarding appellant's lumbar spine or lower extremities. Examination of the shoulders revealed full range of motion of the cervical spine, negative Spurling's test, no evidence of muscle atrophy, full range of motion, intact muscle strength, and intact two point discrimination. Dr. Suchy diagnosed lumbar myositis, rotator cuff tendinitis, and strain of the left shoulder, all resolved. He opined, based on a reasonable degree of medical certainty as well as review of the objective findings, appellant had traumatic lumbar myositis and rotator cuff tendinitis, both which had resolved since there were no objective findings on examination to produce pathology in either area. Dr. Suchy opined that there was total resolution of the conditions related to the work injury of November 10, 2012 and any exacerbation thereof subsequent to that time. He further indicated that appellant could perform his regular activities without restriction and was able to return to his date-of-injury job.

Appellant submitted reports from Dr. Ahsan dated March 14 and 31, April 10, and June 5, 2014 who noted that physical examination remained essentially unchanged. He diagnosed joint pain, shoulder osteoarthritis, myofascial pain/fibromyalgia, lumbar lumbago, lumbar spondylosis, lumbar herniated disc, and lumbar spinal stenosis. Appellant reported improvement after a left shoulder injection.

On June 11, 2014 OWCP requested that Dr. Ahsan review the report from Dr. Suchy advise whether he concurred and to provide rationale for any differences of opinion.

Appellant submitted reports from Dr. Ahsan dated July 16, 2014 to May 26, 2015 who noted appellant's complaints of lower back pain bilaterally and left shoulder pain. Dr. Ahsan noted findings of limited range of motion of the left shoulder with findings consistent with bursitis and rotator cuff tendinitis. On July 16, 2014 he noted reviewing Dr. Suchy's report and disagreed with his finding that appellant could return to full-duty work, noting that appellant had ongoing left shoulder and back pain. Dr. Ahsan diagnosed joint pain, osteoarthritis of the shoulder, myofascial pain/fibromyalgia, lumbar lumbago, lumbar spondylosis, lumbar herniated disc, and lumbar spinal stenosis.

OWCP determined that there was a conflict in medical opinion between the treating physician, Dr. Ahsan, who indicated that appellant continued to have residuals of the work-related injury, and OWCP's second opinion physician, Dr. Suchy, who opined that appellant no longer had residuals of the work-related injury of November 10, 2012 and could return to work full time regular.

An MRI scan of the cervical spine dated February 16, 2015 revealed disc degeneration in the lower cervical spine, disc bulges and protrusion at C5-6 and C6-7, and hemangioma within the T2 vertebral body.

On June 29, 2015 OWCP scheduled an impartial medical examination with Dr. David A. Fetter, a Board-certified orthopedic surgeon. It provided him with a statement of accepted facts (SOAF) dated June 11, 2014 which noted that appellant's claim was accepted for left shoulder strain, low back strain, and lumbar disc herniation at L5-S1. In an August 3, 2014 report, Dr. Fetter detailed the history of the injury and appellant's treatment. He reviewed the SOAF and found that examination of the cervical spine revealed a normal gait. Dr. Fetter noted that appellant could get on and off the examination table without assistance. There was no tenderness to palpation of the cervical spine, no paravertebral muscle tightness. Appellant had a negative bilateral Spurling's sign, no atrophy, fasciculations, or clonus of the arms, and no winging of the scapulae. Deep tendon reflexes were intact, motor examination was normal, and sensory examination was intact to light touch.

For the shoulders, there was no tenderness to palpation, no muscle tightness, and no fasciculations or atrophy. There was no instability of either shoulder, range of motion was normal, and motor strength and sensation to light touch was intact. With regard to the lumbar spine, there was tenderness of the low back to light palpation without muscle tightness on palpation. There was no atrophy, fasciculations, or clonus of the lower extremities. Range of motion was normal, heel to toe walking was intact, strength was intact, and reflexes were normal.

Dr. Fetter diagnosed chronic pain and degenerative lumbar spine, preexistent to reported work injury. He noted that the accepted conditions of left shoulder strain and a lumbar strain were resolved. Dr. Fetter noted that the lumbar disc herniation at L5-S1 was not caused or related to the reported work injury of November 10, 2012. He indicated that the herniated nucleus pulposus at L5-S1 was a preexistent lumbar spine condition for which no treatment was

required. Dr. Fetter opined that the accepted conditions had long since resolved. However, he indicated that a psychosocial evaluation may further elucidate contributing etiologies to his chronic pain diagnosis. Dr. Fetter further noted that there were no residuals attributable to the reported work injury and appellant was capable of returning to his date-of-injury job as described in the SOAF without restrictions.

On September 3, 2015 OWCP proposed to terminate all benefits finding that Dr. Fetter's August 3, 2015 report established no continuing residuals of his work-related conditions.

On September 30, 2015 counsel asserted that Dr. Fetter's report was of diminished probative value and insufficient to terminate appellant's benefits. She indicated that he concluded that the left shoulder strain and lumbar strain were resolved and continued to state that "the later accepted condition, a lumbar disc herniation at L5-S1, was not caused or related to the reported work injury of 11/10/2012." Counsel asserted that a referee physician may not dispute the occurrence of a work incident leading to an injury that OWCP has already accepted as factual and, in connection with such injury, had approved cervical spine surgery. Appellant further asserted that Dr. Fetter did not use the SOAF as the framework in forming his opinion and, therefore, appellant's opinion was seriously diminished or negated. Additionally, counsel argued that Dr. Fetter and Dr. Suchy's reports should be dismissed as they did not state well-rationalized medical reasons for their conclusions, but simply stated conclusions.

Appellant submitted a report from Dr. Ahsan dated March 31, 2014, previously of record. Also submitted were operative reports from Dr. Ahsan dated June 19, 2015 in which appellant underwent cervical epidural steroid injection and was diagnosed with cervicalgia.

On October 22, 2015 OWCP issued an amended notice of proposal to terminate all benefits finding that Dr. Fetter's August 3, 2015 report established no continuing residuals of his work-related conditions.

Appellant through counsel submitted a statement dated November 2, 2015 and reiterated the assertions made in the September 2, 2015 statement. He submitted operative reports from Dr. Ahsan dated April 25 to October 6, 2015 in which appellant underwent lumbar and cervical epidural steroid injections and was diagnosed with L5-S1 disc herniation, cervicalgia, and right lumbar facet joint. In an October 6, 2015 report, Dr. Ahsan treated appellant for lower back pain radiating down the buttocks and calves. He noted findings of positive straight leg raises on the left and restricted range of motion of the lumbar spine. Dr. Ahsan diagnosed spinal stenosis lumbar region, osteoarthritis, and low back pain. He performed a left lumbar steroid injection at L5-S1.

In a decision dated December 14, 2015, OWCP terminated appellant's compensation benefits, effective December 13, 2015. It based its decision on the report of Dr. Fetter, the referee physician, who opined that appellant's accepted work-related conditions resolved and he did not have any residuals.

On January 6, 2016 counsel requested a telephonic oral hearing which was held on August 31, 2016. In a statement dated September 27, 2016, appellant through counsel, asserted that the termination of all benefits was improper as appellant continued to have residuals of his

work injury. Counsel indicated that Dr. Fetter's report could not carry the weight of the evidence to terminate appellant's benefits. She argued that Dr. Fetter had concluded that the left shoulder strain and lumbar strain were resolved, but continued to state that "the later accepted condition, a lumbar disc herniation at L5-S1, was not caused or related to the reported work injury of 11/10/2012." Counsel asserted that a referee may not dispute the occurrence of a work incident leading to an injury that OWCP has already accepted as factual and, in connection with such injury, had approved cervical spine surgery. She contended that Dr. Fetter did not use the SOAF as the framework in forming his opinion and therefore the value of his opinion was seriously diminished.

Appellant also provided evidence from Dr. Ahsan, from December 10, 2015 to March 17, 2016 noting continuing symptoms, treatment, and disability. A lumbar spine MRI scan dated October 9, 2015 revealed moderate L5-S1 stenosis, left-sided asymmetric disc protrusion with partial annular tear, scattered degenerative, and bony spondylotic changes in the lumbar spine. Appellant also submitted medical evidence previously of record.

In a decision dated October 27, 2016, an OWCP hearing representative affirmed the December 14, 2015 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justifying modification or termination of an employee's benefits. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>4</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>5</sup>

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.<sup>6</sup> The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>7</sup>

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<sup>4</sup> *Kenneth R. Burrow*, 55 ECAB 157 (2003).

<sup>5</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> 20 C.F.R. § 10.321.

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual, and medical background, must be given special weight.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted appellant's claim for left shoulder sprain, lumbar sprain, and herniated disc at L5-S1. It found a conflict in the medical opinion evidence between appellant's physician, Dr. Ahsan and the second opinion physician, Dr. Suchy, regarding the nature of her condition, whether it was employment related and the extent of his disability. OWCP referred appellant to Dr. Fetter, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve this conflict.

In his August 3, 2015 report, Dr. Fetter reviewed appellant's medical history, the history of injury, and SOAF. He examined her and diagnosed chronic pain and degenerative lumbar spine, preexistent to reported work injury. Dr. Fetter noted that the accepted conditions of left shoulder and lumbar strain were resolved. He noted that the lumbar disc herniation at L5-S1 was not caused or related to the reported work injury of November 10, 2012. Dr. Fetter indicated that the herniated nucleus pulposus at L5-S1 was a preexisting condition for which no treatment was required. He opined that the accepted conditions had long since resolved, but that a psychosocial evaluation might elucidate contributing etiologies to his diagnosis of chronic pain. Dr. Fetter further noted that there were no residuals attributable to his reported work injury and appellant was capable of returning to his date-of-injury job without restrictions.

Dr. Fetter disregarded the SOAF provided for his review by disputing that the accepted condition of herniated disc at L5-S1 was employment related. As such, the Board finds that his report is of diminished probative value as his opinion disregarded critical elements of the SOAF and is therefore flawed.<sup>9</sup> The Board notes that it is the function of a medical expert to give an opinion only on medical questions, not to find facts.<sup>10</sup> OWCP's procedure manual states that, when the impartial physician does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>11</sup> Dr. Fetter's report is not based on an accurate history and is, therefore, insufficient to resolve the issue of whether appellant is entitled to wage-loss compensation for the periods in questions.

For these reasons, the Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

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<sup>8</sup> *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

<sup>9</sup> *See J.H.*, Docket No. 16-0590 (issued September 12, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(6) (October 1990).

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's medical and compensation benefits.<sup>12</sup>

### **ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 1, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> The Board finds that it is unnecessary to address the second issue in this case in view of the Board's disposition of the first issue.